

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.7350 OF 2005

1. Anil Somdatta Nagpal,
Age 50 years, Occ.Business,
R/o.Bungalow No.7-A/202, Ganga
Estate, Chembur, Mumbai 400 071.

2. Lalit Somdatta Nagpal,
Age 52 years, Occ.Business,
R/o.Bungalow No.36, Atur Park,
Sion-Trombay Road, Chembur,
Mumbai-71.

Applicants

versus

The State of Maharashtra.

Respondent

Shri S.L.Maneshinde with Shri Amin H. Solkar,
advocate for the applicants.

Shri S.R.Borulkar, APP for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 19-11-2005

DATE OF PRONOUNCING THE JUDGEMENT : 13-12-2005

JUDGEMENT :-

1. This is an application for bail on the ground that the mandate of law pertaining to filing of charge sheet being not adhered to, the applicants be released.

2. The facts necessary to consider the

applicability of the relevant statutory provisions are these. In pursuance to the raid on the factory premises of one Deepak Mundada, original accused no.3, wherein two iron tanks of 12,000 and 6,000 litres capacities, a motor tanker containing Benzin, Greenish lubricating in 200 litres barrel, 45 kilos of white powder in 5 gunny bags and a motor tanker containing Mineral Turpentine Oil (MTO) were found and were seized under panchanama. On the basis of a statement of Ranjit Pandurang Desai a case was registered as C.R.No.39/2004 with Karveer Police Station, Kolhapur, against eleven accused persons named in the F.I.R. for offences under sections 3 and 7 of Essential Commodities Act, 1955 and under section 3 of Petroleum Storage and Distribution Act, 2000.

3. The applicants state that on 20.5.2004 the investigation of the above C.R.No.39/2004 came to be transferred to C.B.(Control), Crime Branch, Worli Police Station, Mumbai, on the orders of Director General of Police, Maharashtra State.

4. During the course of investigation some more persons came to be arrested taking the tally to 17 and after initial period of custody, all

accused have been released on bail. On the completion of their investigation the police filed a charge sheet on 5.5.2005 against them also under sections 465, 467, 468, 471, 420 R/W 34 of IPC.. The case was then numbered as R.C.C.No.288/2005.

5. It is contended that after filing of the charge sheet, on 6th May 2005, Police sought permission for further investigation u/s 173(8) of Code of Criminal Procedure (hereinafter referred to as "the Code"), which was granted by the learned Magistrate. Therefore, the applicants submit that the charge sheet filed on 5th May 2005, cannot be a report as contemplated u/s 173(2) of the Code. Such report has to be filed after completion of investigation and not when the same is pending. On 1st July 2005 and 6th July 2005, applicant nos.2 and 1 respectively surrendered before the learned JMFC, Kolhapur. He was pleased to remand them to Judicial Custody. On 8th July 2005 an application was moved by the prosecution seeking their Police Custody on the ground that their involvement is to be fairly investigated, which cannot be done unless and until they are remanded. The applicants state that the learned Magistrate was

pleased to remand them to Police Custody. After the period of police custody, permissible by law, the applicants were remanded to judicial custody. They are detained in the same.

6. Specific case of the applicants is that during pendency of the investigation against them they moved this Court for bail on merits but their applications were rejected.

7. It is their further case that requisite period of 90 days' custody, as contemplated u/s 167(2) of Code, expired on 28th September 2005 in the case of applicant no.2 and on 5th October 2005 in respect of applicant no.1. Till this date the Police did not file any supplementary charge sheet against them. Therefore, an indefeasible right to be released on bail accrued to the applicants. They were ready and willing to furnish bail. Accordingly, on 30th September 2005 applicant no.2 filed an application for bail u/s 167(2) of the Code. It is the applicant's case that this application was directed to be listed for hearing by the learned Magistrate at 12.35 hours on 30th September 2005. He directed the Assistant Superintendent of Court to file report regarding filing of any supplementary

charge sheet against applicant no.2. He also directed that the say of APP and the Investigating Officer, if any, be filed within the time stipulated by him. The Assistant Superintendent attached to the Court, gave his report on the bail application and pointed out that the only charge sheet in this case is filed on 4th May 2005.

8. Thereafter, it is the case of the applicants that on same day i.e. on 30th September 2005, Police filed some documents along with a covering letter addressed to the learned Magistrate. No permission was obtained while doing so from the learned Magistrate. There is no question of such documents being forwarded and/or taken on record because the matter was not listed before the Court. It was on the application of the applicants that the matter was taken up on board. Such documents could not have been, therefore, forwarded to the Magistrate of the Court and that too without prior permission of the learned Magistrate. It is contended that the Assistant Superintendent received documents and gave an endorsement to that effect without written orders of the learned Magistrate. The only inference that can be drawn is that the endorsement of the

Assistant Superintendent is ante-timed. Reliance is placed upon the forwarding letter. In these circumstances, the documents that are filed pursuant to orders of further investigation, can be treated as an action traceable at the most to Section 173(5) and not to Section 173(8) of the Code. The contention, therefore, raised was that forwarding of documents along with forwarding letter is no compliance with provisions of Section 173(2) of the Code.

9. Similarly, applicant no.1 also filed an application for bail on 6th October 2005 upon identical events.

10. The abovementioned bail applications were heard by the learned Magistrate and by an order dated 11th October 2005, he rejected the same.

11. After the order of the learned Magistrate, the applicants moved the learned Sessions Judge, Kolhapur for bail vide Criminal Application Nos.474/2005 and 475/2005. The learned Sessions Judge by a common order delivered on 27th October 2005, rejected their applications. The Courts below have held that there is compliance of Section 173(2) of the Code on 5th May 2005.

Though, the Police have committed an error in not filing a report in the form prescribed while tendering documents u/s 173(8) on 30th September 2005, it is a mere irregularity.

12. Unsuccessful in getting bail on statutory grounds, the present application has been moved by the applicants - original accused.

13. Shri Maneshinde - learned counsel appearing for the applicants submits that the provisions of Section 173 of the Code are mandatory. He also invites my attention to provisions of Section 167 of the Code. He states that report contemplated by Section 173 has necessarily to be in accordance with sub section (2) thereof. The provisions of this sub section are mandatory. He submits that forwarding documents is no compliance with the requirement stipulated by Section 173(8). He invites my attention to the endorsement on the forwarding letter as well as on the bail applications. He invites my attention then to page nos.13 and 15 of the application. He submits that it is clear that the applicants are in custody. The custody, as contemplated by law, can only be under section 167 of the Code. The limitations contemplated

therein fully apply. He states that mere filing of a charge sheet on 5th May 2005 is of no consequence. Once permission to investigate is sought and supplementary charge sheet has to follow, then all requirements stipulated by sub sections (2) to (6) of Section 173 have to be complied with. He submits that supplementary charge sheet has not been filed. There is no question of forwarding letter being treated as a report contemplated by law. In any event, the said letter/report does not satisfy mandatory requirements of Sections 173(2) to (5) of the Code. He submits that conduct of the applicants is irrelevant. Once the requirement stipulated by law is not fulfilled and the applicant gets a statutory and indefeasible right to be released on bail, then acceptance of the documents is also of no consequence. In any event, the entire action is to defeat the indefeasible right of the applicants. Hence, the application be allowed and bail be granted as prayed.

14. In support of his submissions Shri Maneshinde places reliance on the following decisions :-

(a) State (CBI) Vs. Dawood Ibrahim

Kaskar (AIR-1997-SC-2494);

(b) Velu Vishwanathan Vs. State (DB) (Ker) (1971-CrLJ-725).

(c) Aslam Babalal Desai Vs. State of Maharashtra (AIR-1993-SC-1).

(d) Sanjay Dutt Vs. State (II) (1994-SCC (Cri)-1433).

(e) Uday Mohanlal Acharya Vs. State of Maharashtra (2001-CrLJ-1832 Journal 194).

(f) M.C.Venkatareddy Vs. State of A.P. (1994-CrLJ-257).

(g) S.M.Purtado Vs. Dy.S.P., CBI, Cochin (1996-CrLJ-3042).

(h) State of West Bengal Vs. Anwar (2000-CrLJ-2189).

(i) Punjaram Vs. State of Maharashtra (2005[5]-AIR Bom R-119).

(j) Chaganti Satyanarayana and others Vs. State of Andhra Pradesh (AIR-1986-SC-2130).

15. On the other hand, Shri Borulkar - learned Public Prosecutor states that submissions of the applicants with regard to interpolation and additions/alterations in the record of the Court below, cannot be accepted. He states that it is well settled that the Court record has to be presumed as correct. About alterations or interpolations therein, unless and until it is demonstrated that the record does not reflect the proceedings in the Court, correctness of the same cannot be disputed.

16. That apart, Shri Borulkar states that there is no substance in the contentions that the applicants are entitled to be released on bail because of the failure of the prosecution to file charge sheet within the prescribed period. He submits that a charge sheet has been filed in this case on 5th May 2005. That charge sheet shows that the applicants are arrayed as accused. The entire material disclosed till that date has been forming part of the said charge sheet. Shri Borulkar then points out the distinction between Sections 167 and 190 of the Code and contends that Section 190(1)(b) postulates taking cognizance of the offence. Criminal law is unaware of a concept of taking cognizance of the accused. Cognizance of offence is taken upon filing of charge sheet. The Magistrate has already taken cognizance. Page 13 of the paper book is then referred to by Shri Borulkar. His next submission is that Shri Maneshinde does not contend that the charge sheet dated 5th May 2005 is not complying with Section 173(2) of the Code. Therefore, there is no question of applicants having any indefeasible right to apply for and being released on bail. The present application must, therefore, be dismissed.

17. Alternatively, he submits that in Section 173(8) the words used are "as far as may be". There is no question of strict compliance with Section 173(2) when such is the intention of the Legislature. Section 173(8) deals with further investigation. That is not a provision dealing with taking cognizance. He submits that in the present case one of the applicants surrenders on 1st July 2005 and the other on 6th July 2005. Police custody remand is of 8th July 2005. Therefore, 90 days are not completed from the date of arrest. Therefore, right is extinguished. It is only upon failure of the prosecution to comply with the mandate of Section 173(2) that the indefeasible right accrues and not otherwise. In any event, Shri Borulkar states that further report is in time. There is no question of delay and therefore, this application must be dismissed.

18. Shri Borulkar relies upon following decisions in support of his submissions.

(a) AIR-1998-SC-2001 (K.Chandrasekhar Vs. State of Kerala and others).

(b) 2004-ALL MR (Cri) - 2107 (Hamaja Mohiddin Kutty Vs. State of

Maharashtra).

19. For a proper appreciation of the rival contentions, firstly it is necessary to refer to Section 167 of the Code and thereafter Section 173 thereof. These provisions so far as they are relevant for our purpose read thus :-

"167. Procedure when investigation cannot be completed in twenty-four hours.-

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding -

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.

(ii) sixty days, where the investigation relates to any other offences,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;)

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

(Explanation I- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.)

(Explanation-II - If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his

signature on the order authorising detention.

(2A) Notwithstanding anything contained in sub section (1) or sub section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2);

Provided that before the expiry of the period aforesaid, the Executive Engineer shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.)

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

"173. Report of police officer on completion of investigation -

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating -

a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report -

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub section (2)."

20. Section 167 sets out procedure when investigation cannot be completed in 24 hours. That is a contingency covered by sub section (1). It is not necessary to go into this aspect at all. Sub section (2) mandates that the Magistrate to whom an accused is forwarded under

this section, may whether he has jurisdiction to try the case or not, from time to time, authorise his detention in such custody as he thinks fit. However, he can do so for a term not exceeding 15 days in all. If he has no jurisdiction to try the case or commit the same for trial and he considers further detention of the accused necessary, he may order the accused to be forwarded to a Magistrate having jurisdiction. However, no Magistrate can authorise detention of accused person in custody under Section 167 for a total period exceeding 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years and where investigation relates to any other offence, 60 days. It is clear that after expiry of 90 days or 60 days, as the case may be, **the accused person shall be released on bail, if he is prepared to and does furnished bail.** It is this provision which is pressed into service in the present case. The argument is that within the aforesaid period the mandate enshrined in Section 173 of the Code must be complied with. The mandate flowing from Section 173(1) is that every investigation under Chapter-XII must be completed without unnecessary delay. As soon as it is

completed, the officer in-charge of the police station, shall forward to the Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government setting out the particulars in sub section 2 of section 173. Section 173 vide sub sections (3) to (7) provide for procedure to be adopted while forwarding the report. Sub section (8) of Section 173 opens with a non obstante clause and with an intent to permit further investigation. What happens if such investigation is made, is provided in this sub section. The further report on such investigation has also to be forwarded, but the procedure prescribed in sub sections (2) to (6) of Section 173 for forwarding it is applicable, as far as may be. In other words, the said further report shall not be necessarily in the form prescribed by the State Government. If it is possible to adhere to the form, it should be so adhered to. Merely because this requirement is not fulfilled, the report is not vitiated and can be tendered on record. Therefore, submission of Shri Maneshinde that Section 173(2) has to be strictly complied with even while forwarding further report/s, does not appear to be sound on a plain reading of these provisions. However, it

is not necessary to go any further in the light of my views on the indefeasible right of the applicants.

21. As far as Chapter-XIII of the Code is concerned, it provides for jurisdiction of Criminal Courts in inquiries and trials. Section 190 which falls under Chapter-XIV setting out conditions required for initiation of proceedings, and it states that subject to provisions of Chapter-XIV, any Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence, upon police report of such facts and upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed. In the instant case, cognizance of the offence is taken upon police report of the facts. That police report is nothing but what is popularly called "a charge sheet" and as envisaged by Section 173(2). In other words, the term "police report" referred to in Section 190(1)(b) is traceable to the report of police officer upon completion of investigation, forwarded vide Section 173(2). Admittedly, that has been filed in this case on 5th May 2005. Therefore, it is not possible to

accede to the submissions of Shri Maneshinde that the right of the applicants herein to be released on bail because of non compliance with the proviso to sub section (2) of Section 167, subsists in this case. The submissions proceed on the basis that the right under section 167(2) proviso can be availed off at the stage of even Section 173(8). In other words, the charge sheet may have been filed but since the applicants surrender later and a supplementary charge sheet/report is filed, the applicants can take benefit of the above proviso. This plea overlooks the difference between Police Report contemplated by Section 173(2) and Report of further investigation under section 173(8). Mr.Maneshinde has been unable to point out anything in the Code which permits invocation of the proviso to Section 167(2) even in case of further report covered by Section 173(8). Accepting such pleas would mean the right is never extinguished. It can continue endlessly permitting accused to take advantage of their own wrong. Once, the charge sheet was filed in this case then there is nothing in law permitting the applicants to avail of their indefeasible right, which stood extinguished.

22. In any event, these submissions are based upon forwarding to the Magistrate of an accused contemplated by Section 167(2) and the authority, power and jurisdiction of the Magistrate to authorise detention of the accused in custody. According to Shri Maneshinde, because the applicants herein have surrendered before the Court in July 2005, it is from that stage that the period prescribed by Section 167(2) should be computed and once it is so computed, then the fact of filing of charge sheet/report u/s 173(2) earlier i.e. on 5th May 2005 becomes wholly irrelevant.

23. It is not possible to accept this submission either. The reasons for not accepting them are obvious. Section 167(2) provides for power of the Magistrate to authorise detention of the accused who is forwarded to him. The question of forwarding the accused to him, would arise upon his arrest as contemplated by Section 167(1) of the Code. The mandate to forward the person to the Magistrate flows not only upon his arrest but also because of his detention in custody. That is the minimum guarantee when a person is being deprived of his liberty. While it may be true that on surrender to the Magistrate the

applicants herein have been taken in custody but that by itself does not mean that they are entitled to be released on bail after the outer limit prescribed in law. If the Magistrate has taken cognizance of the offence upon police report being filed, then merely because absconding accused surrenders at a later stage and is taken in custody does not mean that the period of 60 days prescribed in Section 167(2) proviso must be computed in such a manner so as to enable him to be enlarged on bail. An accused cannot contend that the Court must take cognisance of his custody and not the offence.

24. In this behalf a reference can usefully be made to Sections 168, 169, 170 and 172 of the Code. In this behalf the phraseology of Section 170(1) is also relevant. The provisions contained in Chapter-XII deal with information to the police and their powers to investigate, as to what is to happen when investigation cannot be completed, is set out in this very Chapter. Investigation if not concluded/completed in 24 hours is a contingency dealt with by Section 167 which enlists the procedure to be followed in case the same arises. However, Section 168 onwards deal with report of investigation by

subordinate police officer, release of an accused without evidence (Section 169), cases to be sent to Magistrate when evidence is sufficient and Section 173 is a provision dealing exclusively with a report to be forwarded by a police officer. Section 173(2) very clearly states that as soon as investigation is complete, the officer in-charge shall forward to a Magistrate empowered to take cognizance of an offence a police report, in the form prescribed by the State Government. Hence, upon investigation being completed and the report contemplated by Section 173(2) being forwarded, cognizance of the offence is taken, and therefore, no question arises of applicability of proviso to Section 167(2) of the Code. Proviso contemplates release on bail when investigation is underway and not being completed within the period of 90/60 days. A person gets a right to be released on bail if he is prepared and chooses to furnish the same. As rightly pointed out by Shri Borulkar, in the present case, investigation was carried out and a report u/s 173(2) was filed on 5th May 2005. The cognizance of the offence was thus taken. Merely because the applicants took their own sweet time to surrender before the Court, does not mean that they will be entitled to avail of the benefit of

proviso to Section 167(2). That pursuant to their arrest and they being detained in custody, a further report was filed u/s 173(8) of the Code, is of no consequence. By its very nature it was a report of further Investigation. That further investigation can be carried out even after forwarding a report u/s 173(2) is an aspect covered by Section 173(8) and not disputed before me. It cannot have any bearing on the so called right of the applicants herein u/s 167(2) proviso.

25. The very fact that Shri Maneshinde urges that further report must also be in the same form as is prescribed for the report contemplated u/s 173(2) means that he is fully aware that the indefeasible right of the applicants has come to an end. An indefeasible right which he asserts for the applicants to be enlarged on bail, gets extinguished on his own showing because of forwarding of the report to the Magistrate, by the prosecution, in this case, on 5th May 2005. It is, therefore, he assails the act of prosecution in forwarding documents with a covering letter to the Court as being not in confirmity with Section 173(2) of the Code. I need not examine the correctness of the

submissions of the applicants about compliance with the mandate of Section 173(2) while forwarding report of a further investigation carried out u/s 173(8) of the Code. These submissions can be considered in an appropriate case.

26. Once the aforesaid submissions are kept open for decision in an appropriate case, then it is also not necessary to go into the issue as to whether there is any interpolation in the record of the Court or any addition or alteration therein can defeat the right of the applicants herein. Respect and regard to record of Court as emphasised by Shri Borulkar, is a principle, which is well settled. About its applicability to the present case and more particularly to the documents forwarded vide covering letter at page 13 of the paper book need not be gone into in the facts and circumstances of the present case, at this stage.

27. In the view that I have taken, the application cannot be granted. It is accordingly rejected.

28. Once this is the clear mandate of law, then

no reference need be made to the decisions brought to my notice. A decision of the Aurangabad Bench of this Court in Criminal Application No.2657/2004 decided on 28th February 2005 (Punjaram Vs. State of Maharashtra) is referred to by Shri Maneshinde. In that case the indefeasible right granted by Section 167(2) was sought to be defeated even though the report forwarded u/s 173(2) was incomplete and not in accordance with the further sub sections of Section 173. Before me, it is not urged that the charge sheet filed on 5th May 2005 was in any way incomplete or can be termed as provisional. On the other hand, the plea is that period commences from the surrender of the applicants before the Court. That is not a contingency covered by this decision. It is, therefore, obviously distinguishable.

29. As far as the decision reported in AIR-1997-SC-2494 (CBI Vs. Daud Ibrahim Kaskar and others), all that is laid down therein is that even after Court takes cognizance of an offence and an accused is arrested subsequent thereto by the police, he can be detained in police custody in exercise of the Court's/ Magistrate's powers u/s 167. That conclusion is

arrived at upon a reading of Section 167(2) itself. The section contemplates authority of the Magistrate to detain an accused forwarded to him in such custody, as he thinks fit. Therefore, a person forwarded to the Magistrate during the course of further investigation and after filing of police report must necessarily be dealt with by this provision, is the law laid down. That decision nowhere states that the person so arrested can avail of the benefit of the proviso from the date of his arrest or detention in custody. This decision is not laying down any law that even such accused gets an indefeasible right to be released on bail. The decision of the Kerala High Court cited by Shri Maneshinde deals with identical provision and more particularly surrender of an accused who is absconding. Therein, the Police were entitled to seek his custody and that is the ratio of Kerala High Court Division Bench decision.

30. Aslam Babalal Desai Vs. State of Maharashtra is a decision of the Supreme Court (AIR-1993-SC-1) considering Section 167(2) proviso. There cannot be any dispute that the proviso dealing with liberty of an individual must be considered strictly.

31. Sanjay Dutt's case reported in 1994-SCC (Cri) - 1433 is once again laying down this settled principle. The following passage from this decision is relevant :-

"... The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment the challan is filed because Section 167 CrPC ceases to apply. The Division Bench in Hitendra Vishnu Thakur also indicated that if there be such an application of the

accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made."

No where this decision states that once the charge sheet is filed and the matter is at the stage of further investigation that the right of the accused under section 167(2) proviso remains and can be enforced. On the other hand, reproduction of the aforesaid passage is enough to reject the submission of Shri Maneshinde. The Supreme Court clearly holds that the right is enforceable till filing of Challan and once the challan is filed, the right must get extinguished.

32. Lastly, what remains is a reference to the decision of Supreme Court in Uday Mohanlal Aacharaya Vs. State of Maharashtra (2001-Cri.L.J.-1832). The reliance on this decision is to emphasise the nature of right conferred by Section 167(2). This decision is laying down the principle as to when this right can be availed of. It does not at all deal with

a situation as to when said right comes to an end.

33. In the light of the above, the decisions relied upon do not take the matter any further. The conclusion that I have reached about rejecting these applications is in no manner contrary to the law laid down by the Hon'ble Supreme Court. Hence, even after these decisions are noted, the conclusion is inescapable that the applicants do not deserve to be enlarged on bail.

34. These were the only submissions canvassed before me. As noted above, the application for bail on merits has already been rejected by this Court. Application dismissed.

(S.C.DHARMADHIKARI, J.)